No. 13-640

IN THE

Supreme Court of the United States

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF MISSISSIPPI,

Petitioner,

v.

INDYMAC MBS, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AARP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JAY E. SUSHELSKY
AARP FOUNDATION LITIGATION
601 E. St. NW
Washington, DC 20049
(202) 434-2151

JAMES J. SABELLA
GRANT & EISENHOFER P.A.
485 Lexington Ave.
New York, NY 10017
(646) 722-8520

ERNEST A. YOUNG
Counsel of Record
203 Strolling Way
Durham, NC 27707
(919) 360-7718
young@law.duke.edu

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

AARP is a nonpartisan, nonprofit organization dedicated to representing the needs and interests of people age fifty and older.[1] AARP is greatly concerned about fraudulent, deceptive and unfair business practices, many of which disproportionately harm older people. AARP thus supports laws and public policies designed to protect older people from such business practices and to preserve the legal means for them to seek redress. Among these activities, AARP advocates for improved access to the civil justice system and supports the availability of the full range of enforcement tools, including class actions.

Persons aged fifty and older comprise a significant percentage of the investing public in United States markets. Older persons are frequent targets of financial fraud because they often must look for investment opportunities that will supplement Social Security and other sources of retirement income. Their need to ensure that they do not "run out of money" in retirement, makes them particularly vulnerable. As a result, AARP has recognized the need to combat securities fraud and made this issue a high priority. AARP has regularly commented on legislative and regulatory proposals that address investment fraud, filed *amicus* briefs in cases involving the securities laws, and opposed legislative efforts to limit the remedies of defrauded investors. The resolution of this

1. This brief has been filed with the written consent of the parties, which filed blanket consents with the Clerk of Court. Pursuant to Rule 37.6, counsel for *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

case will have a significant impact on the integrity of the securities markets and the remediation of securities fraud in those markets.

As the nation's largest membership organization, AARP has also engaged in extensive advocacy and litigation in other areas, such as consumer protection, employment discrimination, employee benefits, and affordable housing. In all these areas, the availability of class action litigation is often critical to AARP's efforts. The present case is likely to have a significant impact on access to aggregate legal remedies for AARP members across the whole spectrum of our organization's legal concerns.

SUMMARY OF ARGUMENT

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), this Court recognized that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 554. The Court grounded its holding in Federal Rule of Civil Procedure 23's provision for class litigation, reasoning that without tolling of the limitations period, members of a putative class would have to make individual filings to protect their rights, which would thus undermine the efficiency goals of the class procedure. This rationale was both procedural (maximizing the efficiency of the litigation process) and general (not tied to any particular statutory scheme) in nature. And the Court's concern for the integrity of the class action process applies regardless of whether the underlying time bar is framed as a statute of limitation or of repose.

Application of *American Pipe*'s rule to securities class actions, which are subject to a three-year bar under Section 13 of the Securities Act of 1933, would not contravene the Rules Enabling Act by "abridg[ing], enlarg[ing], or modify[ing] any substantive right." 28 U.S.C. § 2072(b). Under this Court's precedent, a federal rule of civil procedure (or a judicial interpretation of such a rule) is consistent with this provision if it "really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). Although limitations law has both substantive and procedural aspects, a tolling rule that is generally applicable and integrated into the procedural scheme of Rule 23 easily satisfies this standard. Nor does *American Pipe*'s rule undermine the substantive policies of the Securities Act. Timely filing a class complaint satisfies the underlying policy of any so-called "statute of repose," which is to provide certain notice to potential defendants within the statutory period of the existence and nature of claims against them as well as the potential claimants. Moreover, recent amendments to the securities laws concerning procedure in class actions appear to presuppose the availability of tolling under *American Pipe*. Respondents' challenge to *American Pipe*'s application to § 13's three-year time limitation cannot clear the Rules Enabling Act's high bar for attacks on settled interpretations of Federal Rules of Civil Procedure.

ARGUMENT

I. *American Pipe*'s Tolling Rule Properly Applies to the Securities Act's Three-Year Period.

American Pipe's rule permits a putative class member in a filed class action to rely on the timely filing of the class complaint. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). Without that rule, litigants would need to protect their own claims from becoming time-barred by filing individually (through either intervention or a separate lawsuit) before the question of class certification is resolved.[2] The *American Pipe* rule rests on Rule 23's provision for class litigation, and it is integral to the efficient and constitutional operation of the rule.

This case differs from *American Pipe* in only two potentially relevant respects. First, plaintiffs' claims here were brought under a different federal statute—the Securities Act of 1933. Second, the limitations provision of that statute, Section 13 of the Act, 15 U.S.C. § 77m, is said to include a statute of "repose," rather than an ordinary statute of limitations. This Court has made clear, however, that *American Pipe*'s applicability does not turn on the underlying law that creates the plaintiff's cause of action. *See, e.g.*, *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 353-54 (1983) (applying *American Pipe* to Title VII actions, without considering any substantive differences between civil rights and antitrust actions). And *amicus*

2. *See, e.g.*, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) ("The *American Pipe* Court recognized that unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights.").

shares petitioners' skepticism that so-called statutes of "repose" form a meaningfully distinct legal category or that (if they do) Section 13 falls within it. *See* Brief for Petitioners at 40-45. For the purpose of this brief, however, *amicus* assumes *arguendo* that statutes of "repose" *are* legally distinct from statutes of "limitations" and that Section 13 is such a provision.[3] Any such distinction, though, is both logically and functionally irrelevant to the operation of *American Pipe*'s rule.

A. *American Pipe*'s Tolling Rule Is a Generally Applicable Rule of Federal Law Grounded in Rule 23.

American Pipe held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554. Rule 23 does not, of course, say anything about limitations periods. Respondents appear to conclude from this that *American Pipe* is not a creature of Rule 23 at all, but rather a construction of "the relevant *statute of limitations*: Section 4B of the Clayton Act." Brief for Respondents in Opposition to the Petition ("Opp.") at 24 (citing 15 U.S.C. § 15b).[4] Respondents' claim is

3. Yet another reason why this supposed distinction between this case and *American Pipe* may well be illusory is that the time bar at issue in *American Pipe* has often been referred to as a "statute of repose," including by this Court. *See* Brief for Petitioners at 39-40 n.16

4. *See also* Opp. at 24 ("That the [*American Pipe*] Court considered the public policies underlying other federal laws, including Rule 23, does not transform the case's holding into an interpretation of the Rule untethered to its text.").

inconsistent with what this Court said in *American Pipe*, with how the Court has applied that decision in subsequent cases, and with the functional relationship between the tolling rule and Rule 23.[5]

Respondents seek to depict *American Pipe* as a construction of the Clayton Act's limitations period, relying on *American Pipe*'s statement that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." 414 U.S. at 557-58 (cited in Opp. at 24). As petitioner correctly argues, tolling *is* "consonant with the legislative scheme" of the federal securities laws. *See* Brief for Petitioners at 28-32; *see also infra* Part II.B. Moreover, the quoted statement in *American Pipe* addressed the argument by the petitioner there that the Clayton Act's limitations period was necessarily "substantive" because Congress had enacted a specific statutory period as part of the Act. *See American Pipe*, 414 U.S. at 556. The Court rejected that argument, concluding that "the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." *Id.* at 557 (quoting *Burnett v. New York Central R. Co.*, 380 U.S. 424, 428 (1965)).

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5. As noted by petitioners, the *American Pipe* Court described its holding in several different ways, including that the filing of the class action complaint "commences the action," "tolls the running of the statute [of limitations]," and "suspends the applicable statute of limitations" for asserted class members. *American Pipe*, 414 U.S. at 550, 553-54; Brief for Petitioners at 21. Whether the *American Pipe* rule is referred to as "tolling" or any other term is of no legal importance.

The *American Pipe* rule constitutes a generally applicable question of procedure. While such general procedural considerations may occasionally give way, this occurs not simply because an underlying limitations period has "substantive" qualities but rather only when tolling would create some specific conflict with the underlying statutory scheme. That, *amicus* submits, is why the Court looked beyond "whether a time limitation is 'substantive' or 'procedural'" in itself and looked instead to whether "tolling the limitation in a given context is consonant with the legislative scheme." *Id.* at 557-58.[6] But the fact that a tolling rule must not impliedly repeal the underlying time bar hardly means that the rule is not grounded in more general considerations about class actions. As the Court explained, "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.* at 559.

The bulk of the *American Pipe* opinion focused on more general considerations underpinning Rule 23, not the Clayton Act. As then-Justice Rehnquist later pointed out, "since the Clayton Act did not address the question [of tolling], and since the Court made no reference at

6. In the footnote immediately following, the Court reiterated "[o]ur conclusion that a judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts." 414 U.S. at 558 n.29. As further explained in Part II.B, this statement supports *amicus*'s conclusion that *American Pipe*'s generally applicable interpretation of Rule 23 is valid under the Rules Enabling Act whether or not a given limitations period has certain "substantive" aspects.

all to state law, the source of the tolling rule applied by the Court was *necessarily* Rule 23. Any doubt as to this fact is removed by the Court's lengthy discussion of the history, purposes, and intent of the Rule." *Chardon v. Fumero Soto*, 462 U.S. 650, 664-65 (1983) (Rehnquist, J., dissenting). The *American Pipe* Court thus concluded, "[w]e are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554.[7]

This Court's subsequent cases generally have applied *American Pipe* to class actions under different federal statutory schemes without any close analysis of those schemes' specific limitations periods. In *Crown, Cork & Seal*, this Court applied *American Pipe* in a Title VII class action without any analysis of Title VII as a distinctive statutory scheme; the Court's consideration of "the purposes served by statutes of limitation" was entirely generic. *See* 462 U.S. at 352-53.[8] Likewise, as petitioner explains, this Court's decisions in *United*

7. *See also* 414 U.S. at 545-52 (discussing the history and policies of Rule 23); *id.* at 553 (noting that "[a] contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure").

8. The Court did summarily reject an argument that Title VII's limitations period was *jurisdictional*. 462 U.S. at 349 n.3. Neither respondents nor the Second Circuit have made any similar argument in this case.

Airlines, Inc. v. McDonald, 432 U.S. 385, 392-93 (1977), and *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 176 n.13 (1974), recognized *American Pipe*'s applicability to federal employment discrimination, antitrust, and securities claims without any analysis whether those particular statutory schemes required divergent treatment. *See* Brief for Petitioners at 22-23. These decisions confirm that *American Pipe* is a general rule grounded in Rule 23 and presumptively applicable to *all* class actions.

Chardon, in which the Court applied *state* law to determine the tolling effect of a class filing, is the exception that proves the rule. That case involved federal civil rights claims under 42 U.S.C. § 1983, and again the Court applied *American Pipe*'s tolling rule without asking whether the rule was mandated by § 1983.[9] The specific statutory provisions governing civil rights claims did come into play, however, with respect to the *effect* of the tolling. The Court held that because 42 U.S.C. § 1988 required application of *state* limitations law to § 1983 claims, whether the class action merely suspended or restarted the limitations clock was governed by Puerto Rico law. *See id.* at 662. Justice Rehnquist's dissent, on the other hand, read *American*

9. *See Chardon*, 462 U.S. at 652 (accepting the parties' agreement that "the statute of limitations was tolled during the pendency of the § 1983 class action," but noting that "they disagree as to the effect of the tolling"). Indeed, the dissent took it as common ground that "[i]f the law of a particular State was that the pendency of a class action did not toll the statute of limitations as to unnamed class members, there seems little question but that the federal rule of *American Pipe* would nonetheless be applicable" in federal court. *Id.* at 667 (Rehnquist, J., dissenting). That conclusion presupposes that the tolling issue is either validly governed by Rule 23 or a freestanding rule that is procedural in character.

Pipe to require that the limitations period merely be suspended. *Id.* at 665-66 (Rehnquist, J., dissenting). The critical point, however, is that the majority did not dispute that *American Pipe* is a rule of general applicability; it held only that the rule did not cover the specific question of suspension or renewal. The Court explained, "*American Pipe* simply asserts a federal interest in assuring the efficiency and economy of the class-action procedure," and that "[s]ince the application of this state-law [renewal] rule gives unnamed class members the same protection as if they had filed actions in their own names which were subsequently dismissed, the federal interest set forth in *American Pipe* is fully protected." *Id.* at 661. Moreover, the Court stressed that "'§ 1988 quite clearly instructs us to refer to state statutes,'" *id.* at 662 (quoting *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978)), and that such reference ordinarily includes relevant tolling rules, *id.* at 657-58 (citing *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485 (1980)). *Chardon* thus recognized that Congress may alter procedural default rules for federal question suit by statute; importantly, even here the Court found no intent to change *American Pipe*'s central tolling principle.[10]

Departure from this Court's generalized approach to tolling under Rule 23 would create considerable uncertainty in an area where predictability is at a premium. If tolling were thought to be a function of particular statutory schemes, then the federal courts would have to determine, statute by statute, whether each

10. *See also* Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L.J. 281, 318 (1989) ("[*Chardon*] reaffirmed the implication of *American Pipe* that limitations law that is integral to the concept of the class action could be derived from [Rule 23].").

federal cause of action would be subject to or exempt from *American Pipe*'s principle. No prospective litigant could rely on the filing of a class action to protect his rights until this Court had resolved whether his particular federal cause of action was subject to tolling under *American Pipe*. And this Court would confront an extended stream of cases challenging *American Pipe*'s applicability to this or that federal claim. Strong prudential reasons support this Court's contrary decision to treat *American Pipe* as a general principle grounded in Rule 23.

American Pipe's rule, moreover, is integral to the operation of Rule 23. As this Court has emphasized, Rule 23 is designed to streamline litigation of numerous related claims by obviating the need for individual protective filings. *See American Pipe*, 414 U.S. at 550. Without tolling, putative class members would have to file their own actions or move to intervene prior to a ruling on class certification—"precisely the multiplicity of activity which Rule 23 was designed to avoid." *Id.* at 551; *see also Crown, Cork & Seal*, 462 U.S. at 349-50.

Moreover, Rule 23's opt-out provisions—which have always been considered necessary for reconciling class action litigation with the demands of due process—would not function effectively without tolling. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) ("In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process.") (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). As other *amici* demonstrate, class certification decisions in federal securities class actions frequently occur after the limitations period runs. *See* Brief of Civil Procedure and Securities Law Professors as *Amici Curiae* in Support of Petitioner, at 6-7. In such

cases, absent class members' right to opt out of the class action and file their own lawsuits depends on *American Pipe*; if that rule does not apply in securities class actions, then absent class members will be effectively deprived of the opt-out option in a large class of cases. *See, e.g.*, *Eisen*, 417 U.S. at 176 n.13 (noting that the *American Pipe* rule preserves the right of absent class members to opt out and file their own claims even after the limitations period has run).

This Court has recognized that "due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." *Shutts*, 472 U.S. at 813. *American Pipe*'s interpretation of Rule 23 may thus be necessary to avoid a constitutional objection to the class action rule. *See Edward J. De Bartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").[11]

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11. In *Shutts*, the due process imperative for an opt-out right was particularly compelling because the trial court would have otherwise lacked personal jurisdiction over some of the absent class members. But as leading commentators have noted, due process likely compels opt-out rights for the additional purpose of protecting litigant autonomy of absent class members who will be bound by a class judgment. *See* Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L. Rev. 1057, 1065-66 (2002); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1174 (1998).

In any event, the tolling principle is integral to Rule 23's opt-out provisions as they are presently structured. It follows that *American Pipe* is a general principle of federal class action law—not unique to any particular federal statutory scheme.

B. Any Distinction Between Statutes of "Repose" and Statutes of "Limitations" Is Irrelevant to the *American Pipe* Rule.

In their opposition to the petition for *certiorari*, respondents characterized the effect of so-called statutes of "repose" in categorical terms: "A 'statute of repose,' in contrast [to a statute of limitations], 'creates a substantive right . . . to be free from liability' forever once the prescribed period expires—not merely barring a remedy, but eliminating the underlying cause of action." Opp. at 21 (quoting *Jones v. Saxon Mortg., Inc.*, 537 F.3d 320, 327 (4th Cir. 1998)). But even assuming *arguendo* a distinction between statutes of "repose" and of "limitations," respondents' characterization is not quite right: A plaintiff's cause of action does not somehow *expire* when the "repose" statute runs; rather, it expires *unless the plaintiff files suit within the statutory period*. Hence Section 13 provides that "[i]n no event shall any such action *be brought* . . . more than three years after" the public offering or sale of the security at issue. 15 U.S.C. § 77m (emphasis added). Once properly filed within that period, of course, litigation may well drag on well after the period of repose would otherwise end. Potential defendants have no "right to be absolutely immune to liability after the statutorily prescribed period expires," Opp. at 26, as long as the plaintiff properly files its suit within that period.

American Pipe spoke directly to this question of proper filing: "[T]he filing of a timely class action complaint *commences the action for all members of the class* as subsequently determined." 414 U.S. at 550 (emphasis added). A potential plaintiff who sees that a class action complaint has been filed against the defendant within the limitations period should be able to rely on his inclusion within the putative class and not be penalized for having done so. To protect his rights, he should not be required to file his own timely action or intervene as an individual plaintiff in the class suit. American Pipe made clear that the latter options would undermine the efficiencies that Rule 23 seeks to achieve; hence, the Court created a "tolling" rule that would allow a putative class member to rely on the filing of the class complaint by providing that, in the event that class certification is eventually denied, the litigant would still have a chance to file his own claim within the limitations period.

As petitioner has explained, the same incentives and efficiency concerns apply whether the relevant time bar is framed as a period of limitation or a period of repose. *See* Brief for Petitioner at 30-32. Moreover, the *American Pipe* rule accommodates not only the policies associated with statutes of limitation but also those embodied in statutes of repose; they are, in the end, the same policies. As this Court observed in *American Pipe*, the filing of a class complaint "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555. The benefit provided by a statute of repose is not, after all, an immunity from suit—it is the defendant's right to know whether it will be sued within a certain period of time following the action that may trigger liability.

It is true, as respondents point out, that putative class members "by definition, *are not parties* to the suit." Opp. at 28 (emphasis in original). But the analysis is actually more complex. In *McDonald*, for example, this Court noted that although "the case was 'stripped of its character as a class action' upon denial of certification by the District Court . . . 'it does not . . . follow that the case must be treated as if there never was an action brought on behalf of absent class members.'" 432 U.S. at 393 (quoting Advisory Committee's Note on 1966 Amendment to Rule 23, 28 U.S.C. App., at 7767, and *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 461 (E.D. Pa. 1968)). Consider a case in which class certification is *granted*, but after the statutory period of repose has run. If respondents were right that putative class members are simply no part of the litigation prior to class certification (and if they properly characterize the effect of repose statutes), then the running of the three-year period would extinguish their claims—regardless of whether the trial court ultimately certifies the class. Courts would accordingly be restricted to certifying a class including only those putative plaintiffs whose claims would not be barred by the statute of repose *at the time of certification*, rather than at the time the class complaint was filed.

That is not the law.[12] Plainly, even statutes of repose are subject to at least one form of tolling: the repose period is tolled for absent class members brought into the litigation by the certification of a plaintiff class. This

12. Typically, putative class members' claims would be said to "relate back" to the initial filing once the class is certified. But such relation back is nothing more than a suspension of the limitations or repose period in order to accommodate the imperatives of Rule 23 and other procedural policies.

form of tolling is accepted as a matter of course because it does not undermine any policy of repose embedded in time-for-suit provisions; after all, the defendant has been placed on notice of the claims against it within the statutory period by the filing of the class complaint. But the same is true when the trial court does *not* certify the class action (or certifies a class that excludes some putative class members) and putative class members must file their claims individually.

To be clear, *amicus*'s position is not that that the filing of a class action actually constitutes the filing of a claim by every member of the putative class until such a time as certification is denied. That would actually not justify the *American Pipe* rule, which presumes that the intervention or filing of a separate complaint constitutes a new action against the defendant—not a continuation of the old one. After all, filing of a prior action does not ordinarily toll the statute of limitations for a subsequent lawsuit. *Amicus*'s point, rather, is that putative class members are entitled to rely on the filing of a class complaint without filing their own lawsuits to preserve their rights—and that this is true whether the statutory period is one of limitation or repose. *See Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2379 n.10 (2011) (observing that "a person not a party to a class suit may receive certain benefits (such as the tolling of a limitations period) related to that proceeding") (citing *American Pipe*, 414 U.S. at 553; *United Airlines*, 432 U.S. at 394).

II. *American Pipe*'s Tolling Rule Does Not Violate the Rules Enabling Act.

The Rules Enabling Act empowers this Court "to prescribe general rules of practice and procedure" but requires that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a), (b). In *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010), this Court divided over the proper approach to determining whether the Rules Enabling Act forecloses application of a federal rule of civil procedure. This case is easier than *Shady Grove*, because it does not involve a question of displacing an otherwise applicable *state* rule; as a result, the federalism concerns largely responsible for dividing the Court in *Shady Grove* are irrelevant. But however the Court analyzes the issue, the Rules Enabling Act does not prohibit applying the *American Pipe* rule to Section 13.

A. The *American Pipe* Rule "Really Regulates Procedure."

This Court held in *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941) that the validity of a federal rule of civil procedure turns on whether that rule "really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." 312 U.S. at 14. *Shady Grove* resolved that question with respect to Rule 23 generally, finding it "obvious that rules allowing multiple claims . . . to be litigated together are also valid [under the Rules Enabling Act]." 559 U.S. at 408 (plurality opinion); *accord id.* at 436 (Stevens, J., concurring in the judgment) (agreeing that Rule 23 is valid under the Rules Enabling Act,

although arguing that sometimes applying a federal rule in particular contexts must take account of relevant state substantive policies). The question in the present case is whether *American Pipe*'s application of Rule 23 to Section 13's three-year period requires a different outcome.

That inquiry is complicated by the fact that "[l]imitations is famously a body of rules that are neither grass nor hay, being at once both substantive and procedural." Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L. J. 281, 290. Limitations "are a tool of judicial administration and an allocation of scarce judicial resources," *id.*, and hence "long established and still subsisting choice-of-law practices" have treated them as procedural, *Sun Oil Co. v. Wortman*, 486 U.S. 717, 728 (1988). On the other hand, limitations law serves a number of substantive policies. *See* Carrington, *supra*, at 290.

> The most helpful way to proceed is to recognize that aspects of limitations law may be distinguished for the purpose of characterization. Limitations provisions that are specific to a particular class of claims, such as provisions fixing the length of the limitation for claims arising under designated statutes, reflect political judgments and should be characterized as substantive for most purposes. On the other hand, limitations provisions that are generally applicable tend to reflect values related to the quality of the decisionmaking process and should more frequently be characterized as procedural.

Id. at 291.

From this perspective, the *American Pipe* rule is plainly procedural.[13] It is a trans-substantive rule concerning how limitations periods should be treated in the context of class litigation. It focuses on the difficulties that individual protective filings would cause for the aggregate processing of claims under Rule 23. *See, e.g.*, *Smith*, 131 S. Ct. at 2379 n.10 (observing that the *American Pipe* rule was "specifically grounded in policies of judicial administration"). That is more than sufficient to satisfy *Sibbach*.

Under the *Shady Grove* plurality's approach, that is the end of the matter. Justice Scalia's opinion focused squarely on the federal rule of procedure itself—not on the character of the state rule that Rule 23 displaced. "[I]t is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule." 559 U.S. at 410 (plurality opinion). In this case, of course, the affected

13. As *amicus* discussed in Part I.A, *American Pipe* observed that "[t]he proper test is not whether a time limitation is 'substantive' or 'procedural,' but whether tolling the limitation in a given context is consonant with the legislative scheme." 414 U.S. at 557-58. The Court's point was to reject any absolute categorization of a limitations period as "substantive" or "procedural" based on the formal structure of the underlying statute. *See id.* at 556-57. As the Court explained, "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances," as long as tolling is "not inconsistent with the legislative purpose." *Id.* at 559. The Court's focus on Rule 23 rather than the Clayton Act in *American Pipe* strongly suggests that generally applicable procedural doctrines will run afoul of specific statutory policies only in unusual circumstances.

rule—the Securities Act's limitations period—comes from federal rather than state law. But nothing in the plurality's analysis turned on that point in *Shady Grove*; in fact, the plurality rejected the notion that considerations of federalism grounded in the state-law origin of the affected rule should inform the Rules Enabling Act analysis. *See id.* at 411 & n.9, 414 & n.13.[14]

The plurality's close reading of the *Sibbach* standard drew a sharp distinction between "what the Federal rule *regulates* [and] its incidental *effects*." *Id.* at 412 n.10 (emphasis in original). That distinction is critical here. *American Pipe*'s interpretation of Rule 23 *regulates* the timely filing of claims after a denial of class certification. It *affects* the running of the Securities Act's limitations period, but this is no different from the displacement of the New York rule that the plurality considered irrelevant in *Shady Grove*. Any difference between statutes of limitations and statutes of repose is thus irrelevant, so long as *American Pipe*'s interpretation of Rule 23 "really regulates procedure." *Id.* at 410.

The key point of disagreement between the *Shady Grove* plurality and Justice Stevens' concurrence, moreover, has no bearing on the present case. Justice Stevens' approach would have taken into account the nature not only of the federal rule of procedure, but also that of the state rule it displaced. Justice Stevens read the Rules Enabling Act as striking a balance "between

14. *Compare* 559 U.S. at 422 (Stevens, J., concurring in part and in the judgment) (arguing that courts should presume, for federalism reasons, that federal rules do not preempt state substantive policies).

uniform rules of federal procedure and respect for a State's construction of its own rights and remedies," and he would have read the Act in light of a "separation-of-powers presumption . . . and federalism presumption that counsel against judicially created rules displacing state substantive law." *Id.* at 425 (Stevens, J., concurring in part and in the judgment).

Here, of course, no state law is affected. Only the concurrence's separation of powers presumption remains. Justice Stevens did not discuss the nature or weight of that presumption, instead emphasizing federalism concerns. *See* 559 U.S. at 422. And in any event, as discussed *infra*, Congress's acknowledgement of the *American Pipe* rule in its class action legislation satisfies any separation of powers concern.

As discussed in Part I.A, federal courts do not reconsider *American Pipe*'s applicability each time it is applied to class actions brought under a new federal statute. Because that decision's tolling rule is a general principle that "really regulates procedure," it is valid under the Rules Enabling Act.

B. *American Pipe* Is Consistent with Congress's Statutory Scheme Governing Securities Cases.

Even if the character of the Securities Act's three-year limitations period were relevant, *American Pipe*'s rule would not abridge, enlarge, or modify the rights conferred by that period. To be sure, "'[i]t is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of a case,' . . . and almost 'any rule can be said to have . . . 'substantive effects,'

affecting society's distribution of risks and rewards.'" *Shady Grove*, 559 U.S. at 431-32 (Stevens, J., concurring in part and in the judgment) (quoting 19 Charles Alan Wright, Arthur Miller, & Edward Cooper, Federal Practice and Procedure § 4508, at 232-33 (2d ed. 1996), and John Hart Ely, *The Irrepressible Myth of* Erie, 87 Harv. L. Rev. 693, 724 n.170 (1974)). Hence, this Court has made clear that "[r]ules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act] if reasonably necessary to maintain the integrity of that system of rules." *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 (1987). Because *American Pipe* is a generally applicable tolling rule that this Court deemed essential to maintaining Rule 23's scheme of aggregate litigation, any effect on particular provisions like Section 13 of the Securities Act is necessarily incidental. Moreover, the action of the tolling rule is fundamentally consistent not only with the policies of repose generally but also with Congress's intent regarding aggregate litigation in securities cases.

American Pipe vindicates all the purposes of statutes of repose. Statutes of limitations and repose do not, after all, serve *different* policies—to the extent there is a legal difference, statutes of repose simply permit fewer exceptions to those policies. As this Court noted in *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), "[t]he statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time." *Id.* at 136. Hence, *American Pipe* itself said that tolling limitations periods during the pendency of a class action "fulfilled the policies of *repose* and certainty inherent in the limitation provisions."

414 U.S. at 558 (emphasis added). There is simply no conflict between the interests protected by Section 13 of the Securities Act and the operation of *American Pipe*'s tolling rule.

Moreover, Congress appears to have presumed *American Pipe*'s applicability in the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) ("PSLRA"). That statute "made several important changes" to securities litigation practice, but "it pointedly did not change the requirements of Rule 23" and "incorporated Rule 23 explicitly in one portion of the statute." *In re Cavanaugh*, 306 F.3d 726, 738-39 (9th Cir. 2002) (citing 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(cc)). In particular, the PSLRA's provisions for selection of a lead plaintiff in class litigation cannot operate effectively without tolling.

Under the PSLRA, the first plaintiff to file a securities class action covered by the Act must post a notice "in a widely circulated national business-oriented publication or wire service," 15 U.S.C. § 78u-4(a)(3)(A)(i), describing the action and stating that "any member of the purported class may move the court to serve as lead plaintiff." 15 U.S.C. § 78u-4(a)(3)(A)(i)(II). Within 90 days of publication, the district court must consider any motions by putative class members to become lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(i). Notably, these putative class members are *not* required to file their own individual complaints or to intervene in the lawsuit. The district court selects the "presumptively most adequate plaintiff" by determining which of the applicants has suffered the greatest losses; it must then determine, however, whether that plaintiff "otherwise satisfies the requirements of Rule 23 of the

Federal Rules of Civil Procedure." 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). In particular, the court must evaluate the typicality of the presumptive lead plaintiff's claims and the adequacy of representation that it would provide. *Cavanaugh*, 306 F.3d at 730. "If the plaintiff with the greatest financial stake does not satisfy the Rule 23(a) criteria, the court must repeat the inquiry, this time considering the plaintiff with the next-largest financial stake, until it finds a plaintiff who is both willing to serve and satisfies the requirements of Rule 23." *Id.* Finally, the Act gives other plaintiffs an opportunity to rebut the presumptive lead plaintiff's Rule 23 showing, 15 U.S.C. § 78u-4(a)(3)(B)(iii)(II), and it provides for discovery as part of that process, 15 U.S.C. § 78u-4(a)(3)(B)(iv).[15]

It is obvious that, given the high stakes involved in determining a lead plaintiff, this process may drag out for some time. For some actions, the process of determining a lead plaintiff could well extend past the expiration of the three-year limitations period.[16] If *American Pipe* is deemed inapplicable to that period, then a potential lead plaintiff's appointment might well be challenged on the ground that his individual claims are time-barred. Lead plaintiffs typically file a new amended complaint on behalf of the class following their appointment, but without tolling this might likewise be challenged. And if class certification

15. *See also Cavanaugh*, 306 F.3d at 730 (noting that "[t]he district court may need to hold an evidentiary hearing [at this last stage] and to make a renewed determination of typicality and adequacy").

16. In *Cavanaugh*, for example, the Ninth Circuit issued its *mandamus* reversing the district court's choice over 18 months after filing of the initial complaint. *See* 306 F.3d at 739.

is ultimately denied, then even a judicially selected lead plaintiff might well find itself unable to sue at all if it was not the initial filer. Each of these possibilities is hard to square with Congress's evident intent in the PSLRA. It is much more plausible to suppose that, in explicitly incorporating Rule 23, the PSLRA also incorporated the interpretation of that rule in *American Pipe*.

Amicus submits that, generally speaking, a rule of procedure like *American Pipe* will not go beyond a permissible incidental effect on substantive rights so long as it is general in character. As Professor Carrington has explained, "[r]ulemakers do have authority under the first sentence of the [Rules Enabling] Act to make *general* limitations law that is integral to the federal procedural system of which it is a part"; what they lack, under the Act's second sentence protecting substantive rights, is authority to "make limitations law that is claim-specific, such as a limitation of time applicable to claims arising under a specified federal law." Carrington, *supra* n.10, at 321. Where a general rule of this type is challenged as altering a substantive right, "the bar for finding an Enabling Act problem is a high one." *Shady Grove*, 559 U.S. at 432 (Stevens, J., concurring in part and in the judgment). That standard is not met here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JAY E. SUSHELSKY
AARP FOUNDATION LITIGATION
601 E. St. NW
Washington, DC 20049
(202) 434-2151

JAMES J. SABELLA
GRANT & EISENHOFER P.A.
485 Lexington Ave.
New York, NY 10017
(646) 722-8520

ERNEST A. YOUNG
Counsel of Record
203 Strolling Way
Durham, NC 27707
(919) 360-7718
young@law.duke.edu

Counsel for Amicus Curiae